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NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

CV 16 0474

CRB

**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

**SAN JOSE DIVISION**

| | |
|---|---|
| NFL PROPERTIES LLC, PANTHERS FOOTBALL, LLC D/B/A CAROLINA PANTHERS, and PDB SPORTS, LTD. D/B/A DENVER BRONCOS FOOTBALL CLUB,<br><br>Plaintiffs,<br><br>v.<br><br>DOES 1 through 100, inclusive,<br><br>Defendants. | Case No.<br><br>**NOTICE OF MOTION AND MOTION FOR EX PARTE TEMPORARY RESTRAINING ORDER, SEIZURE ORDER, AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**<br><br>Date:<br>Time:<br>Dept.:<br>Judge:<br><br>Complaint Filed:<br>Trial Date: Not Yet Set<br><br>**[FILED UNDER SEAL PURSUANT TO 15 U.S.C. § 1116]** |

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## NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that, on January 26, 2016, at 9:00 a.m., in Courtroom __ of the United States Courthouse, 280 South First Street, Room 2112, San Jose, California 95113, or as soon thereafter as the Court allows, Plaintiffs NFL Properties LLC ("NFLP"), Panthers Football, LLC d/b/a Carolina Panthers (the "Carolina Panthers"), and PDB Sports, Ltd. d/b/a Denver Broncos Football Club (the "Denver Broncos") (collectively, the "Plaintiffs") will and hereby do move the Court for an *Ex Parte* Temporary Restraining Order, Seizure Order for unlicensed merchandise and tickets bearing trademarks owned by Plaintiffs, and Order to Show Cause for Preliminary Injunction in the form of the [Proposed] Order attached hereto. Pursuant to 15 U.S.C. § 1116(d), Plaintiffs are permitted to bring this motion *ex parte*. This motion is based on this notice of motion and the supporting memorandum; the accompanying affidavits; the exhibits thereto; matters subject to judicial notice; and such other and further matters as may be called to the attention of the Court.

## RELIEF REQUESTED

Plaintiffs seek an order to stop Defendants from manufacturing, distributing, offering for sale, selling, and/or advertising any merchandise or tickets bearing the Plaintiffs' federally registered trademarks and/or California state registered trademarks prior to, during, and immediately after the Super Bowl 50 game, which will take place on February 7, 2016, at Levi's® Stadium in Santa Clara, California. Plaintiffs seek an order commencing at 12:00 p.m. on Thursday, February 4, 2016, and remaining in effect through Monday, February 8, 2016, at 5:00 p.m., encompassing the counties of Santa Clara, San Francisco, Alameda, and San Mateo.

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Plaintiffs NFL Properties LLC ("NFLP"), Panthers Football, LLC d/b/a Carolina Panthers (the "Carolina Panthers"), and PDB Sports, Ltd. d/b/a Denver Broncos Football Club (the "Denver Broncos") (collectively "Plaintiffs") submit this Memorandum of Points and Authorities in support of their *Ex Parte* Application for a Temporary Restraining Order, Seizure Order, and Order to Show Cause for Preliminary Injunction (Plaintiffs' "Application"). Plaintiffs' Application seeks to empower duly authorized law enforcement officials and representatives of NFLP to seize and impound counterfeit merchandise and counterfeit, unredeemable tickets bearing the trademarks of the National Football League ("NFL"), NFLP, the Carolina Panthers, and/or the Denver Broncos.

## I. INTRODUCTION

In the coming days, hundreds of thousands of fans will arrive in the San Francisco Bay Area to witness the Carolina Panthers play the Denver Broncos in Super Bowl 50, the golden anniversary of the National Football League's championship game, scheduled to be played on Sunday, February 7, 2016, at Levi's® Stadium in Santa Clara. Hundreds of millions more will watch this iconic event on television. The Super Bowl 50 game is a landmark occasion, celebrated by the NFL's "On The Fifty" campaign, which is designed to look back on the past forty-nine Super Bowl games while also commemorating this year's historic event. *See* Declaration of Anastasia Danias ("Danias Decl.") ¶ 6. The NFL is also celebrating by making a one-time change from the Roman numerals it traditionally uses to number its championship games, to the Arabic numeral "50" for this special occasion. *Id.*

While the Super Bowl 50 game will be a unique opportunity to showcase the NFL, the Carolina Panthers, the Denver Broncos, and the San Francisco Bay Area, past experience proves that it will also be a time when itinerant vendors will appear in the Northern District of California to sell unlicensed, counterfeit merchandise ("Counterfeit Merchandise") and unlicensed, unredeemable counterfeit tickets ("Counterfeit Tickets") bearing the NFL Trademarks. As NFLP has learned from prior Super Bowl games, many of these vendors are professional counterfeiters who direct their activities to large-scale sporting and entertainment events. *See, e.g.,* Danias Decl. and Declaration of Wayne Grooms ("Grooms Decl.").

The great popularity of the Super Bowl game and the strong public interest in it annually generate the production and sale of substantial quantities of Counterfeit Merchandise and Counterfeit Tickets (together, "Counterfeits"). These Counterfeits are generally produced by large-scale professionals for distribution through networks of largely anonymous and mobile middlemen and street vendors, who descend on the region hosting the Super Bowl game a few days before the date of the game, distribute their merchandise for cash resale, and disappear without detection. *See, e.g.*, Danias Decl. ¶¶ 25-29; Grooms Decl. ¶ 13; and Declaration of Heather Holdridge ("Holdridge Decl.") ¶ 9. These vendors maintain no permanent business identities and will take additional steps to cloak their activities, including by ignoring requirements to obtain permits that regulate lawful street vending in the San Francisco Bay Area. Danias Decl. ¶ 29. Recent investigation by security representatives of NFLP has revealed the manufacture, distribution, offering for sale, and actual sale of significant quantities of Counterfeits by Defendants, and by and through Defendant vendors who will sell these Counterfeits in the San Francisco Bay Area in connection with the Super Bowl game. *See* Grooms Decl. ¶¶ 5, 10-13. However, the specific identity of individual Defendants is not currently known, and cannot be learned, until the sales of Counterfeits begins. Grooms Decl. ¶ 13.

By their Application, Plaintiffs seek (i) to restrain these vendors from selling Counterfeit Merchandise and Counterfeit Tickets at or before the point of sale, and (ii) authorization for Plaintiffs' representatives, accompanied by law enforcement personnel, to seize Counterfeit Merchandise and Counterfeit Tickets being manufactured, distributed, advertised, offered for sale, and/or sold by Defendants in the San Francisco Bay Area. Plaintiffs request that the seizure order be effective in the counties of Santa Clara, San Francisco, Alameda, and San Mateo (collectively, "Bay Area Counties") beginning at 12:00 p.m. on Thursday, February 4, 2016, and ending on Monday, February 8, 2016, at 5:00 p.m. (as may be extended by the Court).

The relief sought by Plaintiffs is essentially identical to that sought by NFLP and granted by various courts throughout the United States in connection with thirty-three past Super Bowl games: Super Bowl XLIX - Glendale, Arizona; Super Bowl XLVIII - East Rutherford, New Jersey; Super Bowl XLVII - New Orleans, Louisiana; Super Bowl XLVI - Indianapolis, Indiana; Super Bowl XLV - Dallas, Texas; Super Bowl XLIV - Miami, Florida; Super Bowl XLIII - Tampa, Florida; Super Bowl XLII - Glendale, Arizona; Super Bowl XLI - Miami, Florida; Super Bowl XL -

Detroit, Michigan; Super Bowl XXXIX - Jacksonville, Florida; Super Bowl XXXVIII - Houston, Texas; Super Bowl XXXVII - San Diego, California; Super Bowl XXXVI - New Orleans, Louisiana; Super Bowl XXXV - Tampa, Florida; Super Bowl XXXIV - Atlanta, Georgia; Super Bowl XXXIII - Miami, Florida; Super Bowl XXXII - San Diego, California; Super Bowl XXXI - New Orleans, Louisiana; Super Bowl XXX - Phoenix, Arizona; Super Bowl XXIX - Miami, Florida; Super Bowl XXVIII - Atlanta, Georgia; Super Bowl XXVII - Pasadena, California; Super Bowl XXVI - Minneapolis, Minnesota; Super Bowl XXV - Tampa, Florida; Super Bowl XXIV - New Orleans, Louisiana; Super Bowl XXIII - Miami, Florida; Super Bowl XXII - San Diego, California; Super Bowl XXI - Pasadena, California; Super Bowl XX - New Orleans, Louisiana; Super Bowl XIX - Palo Alto, California; Super Bowl XVIII - Tampa, Florida; and Super Bowl XVII - Pasadena, California.

The facts supporting Plaintiffs' Application are fully set forth in the declarations of Anastasia Danias, Senior Vice President and Chief Litigation Officer for the NFL and Assistant Secretary of Plaintiff NFLP; Heather Holdridge, an experienced private investigator licensed in California; Wayne Grooms, an experienced private investigator who has participated in the execution of seizure orders at the past nineteen Super Bowl games; Todd D. Schoenberger, Special Agent for the United States Department of Homeland Security, Immigration and Customs Enforcement ("ICE"), Homeland Security Investigations ("HSI"), who is assigned to the San Jose Field Office, within the Area of Responsibility of the Office of the Special Agent in Charge, San Francisco; Richard Bailey, a Financial Crimes Detective with the Santa Clara Police Department; Jose A. Martinez, a Detective Police Officer with the San Jose Police Department; and Joseph E. Petersen, a partner at the law firm of Kilpatrick Townsend & Stockton LLP, counsel for the Plaintiffs. *See* Danias Decl., Holdridge Decl., Grooms Decl., Declaration of Todd D. Schoenberger ("Schoenberger Decl."), Declaration of Richard Bailey ("Bailey Decl."), Declaration of Jose A. Martinez ("Martinez Decl."), and Declaration of Joseph E. Petersen ("Petersen Decl."). The facts contained in the declarations are summarized below.

## II. SUMMARY OF FACTS

The NFL and its thirty-two member clubs ("Member Clubs") annually present a season of football games which culminates in a championship game known as the "Super Bowl." The Super Bowl game is often referred to as the nation's premier sporting event, and is viewed by hundreds of millions of people worldwide on television. Danias Decl. ¶¶ 8-9.

NFLP owns all of the NFL's trademarks, names, logos, symbols, slogans, and other identifying marks and indicia (both registered and unregistered) and is responsible for licensing and protecting the same. NFLP also is the authorized representative of the NFL's thirty-two Member Clubs with respect to the licensing and protection of their trademarks, names, logos, symbols, slogans, and other identifying marks and indicia, including the marks adopted and used by the Carolina Panthers and the Denver Broncos. The trademarks, names, logos, symbols, slogans, and other identifying marks and indicia relating to the activities of the NFL and the Member Clubs are collectively referred to herein as the "NFL Trademarks."

The NFL Trademarks include: NATIONAL FOOTBALL LEAGUE, NFL, the NFL Shield Design (including both current and earlier versions), SUPER BOWL, 50, the SUPER BOWL 50 Design, SUPER SUNDAY, ON THE FIFTY, VINCE LOMBARDI TROPHY, the VINCE LOMBARDI TROPHY Design, AMERICAN FOOTBALL CONFERENCE, AFC, the AFC Design (including both current and earlier versions), the AFC Champion Trophy Design, NATIONAL FOOTBALL CONFERENCE, NFC, the NFC Design, the NFC Champion Trophy Design, NFL EXPERIENCE, BACK TO FOOTBALL, the BACK TO FOOTBALL Design, TOGETHER WE MAKE FOOTBALL, NFL NETWORK, the NFL NETWORK Design, NFL ON LOCATION, NFL SHOP, NFL TICKET EXCHANGE, ON FIELD, PRO BOWL, SUNDAY NIGHT FOOTBALL, MONDAY NIGHT FOOTBALL, TASTE OF THE NFL, CAROLINA PANTHERS, PANTHERS, BELONG, TWO STATES. ONE TEAM., KEEP POUNDING, the PANTHERS Design, the PANTHERS Stylized Design, the CAROLINA PANTHERS Uniform Designs, DENVER BRONCOS, BRONCOS, BRONCOS COUNTRY, MILE HIGH MAGIC, MILES, ORANGE SUNDAY, ORANGE CRUSH the BRONCOS Designs, the D & Horse Design, the Football Player On Bronco Design, the BRONCOS Horse Riding Design, the BRONCOS Twisting Horse Design, the Twisting Horse Design, the BRONCOS Mascot Design, the DENVER BRONCOS Uniform Designs, and the DENVER BRONCOS Helmet Designs (including both current and historic versions), among others.

The NFL Trademarks are registered, and many are incontestable. *See* Danias Decl. ¶ 13 and Copies of the Certificates of Registration attached as Exhibits 1 and 2 thereto. NFLP is empowered to license the NFL Trademarks to third parties for use in connection with goods and services. Danias Decl. ¶ 14.

NFLP has licensed numerous companies to produce and sell a wide variety of souvenir merchandise bearing the NFL Trademarks. Danias Decl. ¶¶ 14-18. This merchandise is produced under strict quality control guidelines designed both to promote an image of quality for the NFL and its Member Clubs, and to ensure that the purchasing public receives a quality product. *Id.* ¶¶ 15-16. NFLP also licenses the production and sale of souvenir merchandise relating specifically to the Super Bowl game. *Id.* ¶¶ 23-24. In fact, for the Super Bowl 50 game, NFLP has licensed approximately one hundred companies to produce a wide variety of merchandise. *Id.* ¶ 23.

As is the case with many eagerly anticipated large-scale entertainment events, the Super Bowl game precipitates the production and sale of a wide range of Counterfeit Merchandise and Counterfeit Tickets, which infringe upon the NFL Trademarks. Grooms Decl. ¶ 8; Holdridge Decl. ¶ 7. Generally, the Counterfeit Merchandise and Counterfeit Tickets are produced by professional infringers who concentrate on large-scale, short-term events such as sporting events and music concerts. Danias Decl. ¶¶ 25-26, 29; Grooms Decl. ¶¶ 8-9, 11; Holdridge Decl. ¶ 8. These infringers produce inferior quality Counterfeit Merchandise as quickly as they can, and generally distribute it through itinerant vendors. Danias Decl. ¶ 29; Grooms Decl. ¶¶ 12-13. They also produce and sell unredeemable Counterfeit Tickets to fans seeking entrance into events. Danias Decl. ¶ 29. Professional counterfeiters recognize the illegality of their conduct and thwart NFLP's investigative efforts by concealing their identities, using middlemen, and/or transferring the merchandise upon detection. Danias Decl. ¶ 33; Grooms Decl. ¶ 13.

NFLP's previous trademark protection efforts during the Super Bowl games and the days leading up to the games demonstrate that the professional infringers who "work" the site of the Super Bowl game will defy or avoid temporary restraining orders, and will continue to sell their Counterfeit Merchandise and Counterfeit Tickets in any possible manner. Danias Decl. ¶¶ 29-33.

The only effective way to combat this problem is to seize the goods and tickets at the point of sale. *Id.*; Danias Decl. ¶¶ 31-35; Grooms Decl. ¶¶ 11-13; Holdridge Decl. ¶¶ 9-11.

NFLP has been granted *ex parte* seizure orders each year since 1983 by courts throughout the United States in connection with every one of the past thirty-three Super Bowl games. *Id.* ¶¶ 7, 30. All seizures made pursuant to the previous orders were executed in accordance with the court's decree and without any breaches of the peace. *Id.* ¶ 36. With Court approval following the hearing on the Order to Show Cause for Preliminary Injunction, NFLP will destroy the Counterfeit Tickets and Counterfeit Merchandise or, if appropriate, will donate the seized merchandise to one or more charitable organizations. *Id.* ¶ 38.

Based on the foregoing, Plaintiffs respectfully request that the Court grant the instant application and issue the [Proposed] Temporary Restraining Order, Seizure Order, and Order to Show Cause for Preliminary Injunction against Defendants submitted herewith.

## III. ARGUMENT

### A. PLAINTIFFS ARE ENTITLED TO TEMPORARY AND PRELIMINARY INJUNCTIVE RELIEF ENJOINING DEFENDANTS' ILLEGAL ACTS.

Courts routinely award preliminary relief in the form of a temporary restraining order and preliminary injunction when the sale of counterfeit products threatens a trademark holder's "right to control the quality of the goods manufactured and sold under the holder's trademark." *See, e.g.*, *El Greco Leather Prods. Co., Inc. v. Shoe World, Inc.*, 806 F.2d 392, 395 (2d Cir. 1986). The standards for granting a temporary restraining order and preliminary injunction are the same. *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). To obtain a preliminary injunction, a plaintiff must demonstrate the following: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary relief; (3) that the balance of the equities tips in the moving party's favor; and (4) that an injunction is in the public interest. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 877 (9th Cir. 2009) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

Under the Ninth Circuit's "sliding scale" approach, the first and third elements are to be balanced such that "serious questions" going to the merits and a balance of hardships that "tip sharply" in favor of the moving party are sufficient for relief so long as the other two elements are also met. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). Further, "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Id.* at 1131.

Here, the facts and law overwhelmingly favor the issuance of the requested relief.

**1. Plaintiffs Will Prevail on the Merits of Their Claims.**

**(a) *Plaintiffs are likely to succeed on their Lanham Act trademark counterfeiting claims.***

"[T]o prevail on a trademark infringement claim under the Lanham Act, a plaintiff must establish that the defendant is 'using a mark confusingly similar to a valid, protectable trademark' of the plaintiff's." *CytoSport, Inc. v. Vital Pharm., Inc.*, 617 F. Supp. 2d 1051, 1065 (E.D. Cal. 2009) (*quoting Brookfield Commc'ns, Inc. v. West Coast Entm't,* 174 F.3d 1036, 1046 (9th Cir. 1999). The test for trademark infringement is the same under state, federal, and common law, *see M2 Software, Inc. v. Madacy Entm't,* 421 F.3d 1073, 1080 (9th Cir. 2005), as are the tests for false designation of origin and common law and statutory unfair competition based on claims of trade-mark infringement. *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 632 (9th Cir. 2008). Trademark registrations "constitute prima facie evidence that plaintiff owns a valid and protectable mark and has the exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the registrations." *CytoSport,* 617 F. Supp. 2d at 1065 (*citing Applied Info. Scis. Corp. v. eBay, Inc.*, 511 F.3d 966, 970 (9th Cir. 2007)). Registrations that have become incon-testable constitute "conclusive evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce." 15 U.S.C.A. § 1115(b).

Plaintiffs have established that they own and/or control all rights, title, and interest in and to the NFL Trademarks in connection with the type of goods and services commonly counterfeited by Defendants, namely NFL football jerseys, headwear, other apparel, tickets, collectibles, and other merchandise. Plaintiffs also have demonstrated that the NFL Trademarks are the subject of multiple federal trademark registrations, most of which have become incontestable and therefore serve as conclusive evidence of the validity of the corresponding marks. Those that have not yet become incontestable remain prima facie evidence of the validity of the corresponding marks, as well as Plaintiffs' exclusive rights to use their marks in commerce and in connection with the goods or services specified in the registrations. 15 U.S.C. §§ 1057(b), 1115(a); *see CytoSport,* 617 F. Supp. 2d at 1065.

Likelihood of confusion ordinarily is analyzed using the factors enunciated in *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979), abrogated on other grounds by *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 810 n.19 (9th Cir. 2003). This eight-factor test is "pliant," with some factors being more important than others, and the relative importance of each factor being case-specific. *Brookfield*, 174 F.3d at 1054. "The inquiry may proceed in any order and a court need not address every factor." *Interplay Entm't Corp. v. TopWare Interactive, Inc.*, 751 F. Supp. 2d 1132, 1136 (C.D. Cal. 2010).

These facts present an easy case here because, where counterfeit marks are involved, it is not necessary to perform the step-by-step examination of each *Sleekcraft* factor "because counterfeit marks are inherently confusing." *Phillip Morris USA Inc. v. Shalabi,* 352 F. Supp. 2d 1067, 1073 (C.D. Cal. 2004) (citation omitted); *see also Coach, Inc. v. Pegasus Theater Shops,* No. C12-1631-MJP, 2013 WL 5406220, at *3 (W.D. Wash. Sept. 25, 2013) ("[b]ecause counterfeit marks are, by design, 'inherently confusing,' if the plaintiff presents evidence demonstrating an allegedly infringing mark is counterfeit, then a strong likelihood of confusion is established and analysis of the *Sleekcraft* factors is unnecessary.") (citation omitted); *Gucci Am., Inc. v. Duty Free Apparel, Ltd.*, 286 F. Supp. 2d 284, 287 (S.D.N.Y. 2003); *Paulsson Geophysical Servs. V. Sigmar*, 529 F.3d 303, 310-311 (5th Cir. 2008) (noting analysis of trademark digits of confusion is "inapplicable to the facts of [a] case where the [Defendant] used the exact same mark"); *Microsoft Corp. v. CMOS Techs., Inc.,* 872 F. Supp. 1329, 1335 (D.N.J. 1994) ("It would be difficult to imagine a clearer case of consumer confusion than the instant case in which the defendants, acting in direct competition with the plaintiff, sold counterfeit products on which plaintiff's registered marks appear in their entirety. Under these circumstances, the likelihood of consumer confusion, mistake, or deception is clear.").

Indeed, courts have specifically recognized that counterfeiting of NFL Trademarks causes consumer confusion as a matter of law. *See, e.g.*, *National Football League v. Lionk Zhu d/b/a nfl-provider.com*, No. 13-Civ-5416 (S.D.N.Y. Aug. 14, 2013); *National Football League v. Gong Sunmei d/b/a nfl-2013.com*, No. 13-Civ-2572 (S.D.N.Y. Apr. 24, 2013); *National Football League Props., Inc. v. Lieber,* 19 U.S.P.Q.2d 1783, 1784 (Fla. Cir. Ct. 1991); *National Football League Props., Inc. v. Jamal,* 10 U.S.P.Q.2d 1772, 1773 (Fla. Cir. Ct. 1989); *National Football League Props., Inc. v. Yingling,* 224 U.S.P.Q. 848, 851 (Fla. Cir. Ct. 1984).

The Lanham Act defines a counterfeit mark as a "spurious mark which is identical with, or substantially indistinguishable from, a registered mark" used by an unauthorized producer. 15 U.S.C. §§ 1116(d), 1127. "When a genuine mark is affixed to a counterfeit product, it becomes a spurious mark. A 'spurious' mark is one that is false or inauthentic." *U.S. v. Petrosian,* 126 F.3d 1232, 1234 (9th Cir. 1997). Plaintiffs have established that: (1) the marks used by Defendants on the Counterfeit Merchandise and Counterfeit Tickets are identical to or substantially indistinguishable from the federally registered NFL Trademarks, which Plaintiffs are using in commerce on their genuine products; and (2) Defendants' use of the NFL Trademarks on the Counterfeit Merchandise and Counterfeit Tickets is not authorized by the NFL, NFLP, the Carolina Panthers, or the Denver Broncos. Danias Decl. ¶¶ 10,13, 25-27, 31, 33. Thus, there is no question that Defendants' marks are counterfeit and, therefore, are confusing as a matter of law. However, in an abundance of caution, Plaintiffs address each of the eight, non-exhaustive *Sleekcraft* factors in turn below.

**i. Strength of the Mark**

Plaintiffs and NFLP's licensees have invested tremendous amounts of resources into marketing, promoting, and protecting the NFL Trademarks. Danias Decl. ¶¶ 15-21. As a result of Plaintiffs' efforts, products bearing the NFL Trademarks are immediately identifiable among consumers as having been sponsored or approved by the NFL, NFLP, and the Member Clubs. *Id.* Furthermore, there can be no doubt that the general public is familiar with the NFL Trademarks based on the huge populations of fans who watch NFL games on television and the Internet, attend games at stadiums, read about game action and their favorite Member Clubs in various media outlets, and purchase products bearing the NFL Trademarks. *Id.* at ¶¶ 11-12. Finally, the fact that the NFL

Trademarks are the subject of numerous federal trademark registrations, besides creating a strong presumption of validity, stands as proof of the strength of the marks. *Am. Home Prods. Corp. v. Johnson Chem. Co., Inc.*, 589 F.2d 103, 106 (2d Cir. 1978). Accordingly, the NFL Trademarks are strong and this factor favors a finding of likelihood of confusion.

**ii. Proximity of the Goods**

Defendants' Counterfeit Merchandise and Counterfeit Tickets are in direct competition with Plaintiffs' legitimate products and tickets and compete for the same purchasers. Danias Decl. ¶¶ 25-26, 33. The fact that Defendants are selling the same type of goods sold by Plaintiffs is one of the three most important factors to be considered in the likelihood of confusion analysis. *See GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1206 (9th Cir. 2000). This factor, therefore, supports a finding of likelihood of confusion.

**iii. Similarity of the Marks**

The Ninth Circuit has also expressly stated that similarity of the marks is another of the three most probative factors in the likelihood of confusion analysis. *GoTo.com*, 202 F.3d at 1205. In the instant case, Defendants are using spurious copies of the NFL Trademarks. Such direct copying supports a finding of likelihood of confusion.

**iv. Evidence of Actual Confusion**

Actual confusion is unnecessary to establish infringement since the test is likelihood of confusion. *Eclipse Assocs. Ltd. v. Data General Corp.*, 894 F.2d 1114, 1118 (9th Cir. 1990). Indeed, the court in *Sleekcraft* held "[b]ecause of the difficulty in garnering such evidence, the failure to prove instances of actual confusion is not dispositive." *Sleekcraft*, 599 F.2d at 353. Here, however, Plaintiffs historically have received complaints from consumers and Plaintiffs' business partners about the Counterfeit Merchandise and Counterfeit Tickets sold by Defendants to unsuspecting consumers. Danias Decl. ¶ 27.

**v. Marketing Channels Used**

Convergent marketing channels increase the likelihood of confusion. *Sleekcraft*, 599 F.2d at 353. Both Plaintiffs' legitimate merchandise and tickets and the Counterfeit Merchandise and Counterfeit Tickets are marketed and sold in the vicinity of the Super Bowl game and Super Bowl

50-related events in the Bay Area Counties. Both categories of goods target the same general customers, and as such, Defendants' Counterfeit Merchandise and Counterfeit Tickets are competing directly with Plaintiffs' legitimate merchandise. Danias Decl. ¶¶ 25-26, 29, 33. Therefore, this factor favors a finding of likelihood of confusion.

**vi. Type of Goods and Degree of Care Likely to be Exercised**

The standard used by courts in assessing likelihood of confusion of the public is not that of an expert, but rather the "typical buyer exercising ordinary caution." *Sleekcraft*, 599 F.2d at 353. "Low consumer care … increases the likelihood of confusion." *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 354 F.3d 1020, 1028 (9th Cir. 2004). The broad group of NFL fans are not likely to exercise a high degree of care when purchasing Counterfeit Merchandise and Counterfeit Tickets because, *e.g.*, they may reasonably suspect that similarly-priced counterfeit goods have a common origin with or are in some way related to genuine goods. The fact that ticket prices may be high does not prevent this outcome, as the law is designed to protect the purchasing public, including "the ignorant, the inexperienced, and the gullible." *Stork Res. v. Sahati*, 166 F.2d 348, 359 (9th Cir. 1948). Accordingly, this factor weighs in favor of a finding of likelihood of confusion.

**vii. Defendants' Intent in Selecting the Mark**

The Ninth Circuit has held that "[w]hen an alleged infringer knowingly adopts a mark similar to another's, courts will presume an intent to deceive the public." *Official Airline Guides, Inc. v. Goss*, 6 F.3d 1385, 1394 (9th Cir. 1993). In a case of clear-cut copying such as this, it is appropriate to infer that the defendant intended to benefit from plaintiff's reputation, to the detriment of plaintiff. *See Interstellar Starship Serv. Ltd. v. Epix, Inc.*, 184 F.3d 1107, 1111 (9th Cir. 1999) ("Adopting a designation with knowledge of its trademark status permits a presumption of an intent to deceive …. In turn, intent to deceive is strong evidence of likelihood of confusion."). There can be no doubt that Defendants have chosen to reproduce the NFL Trademarks based on a bad faith intent to profit illicitly at the expense of Plaintiffs and consumers. Danias Decl. ¶¶ 25-33. This factor, therefore, supports a finding of likelihood of confusion.

**viii. Likelihood of Expansion of Product Lines**

Plaintiffs and their licensees already distribute goods which are virtually identical, except in quality, to those being sold and offered for sale by Defendants. Since Defendants are already directly competing with Plaintiffs by selling the aforementioned Counterfeit Merchandise and Counterfeit Tickets, analysis of this factor is unnecessary. *See Nova Wines, Inc. v. Adler Fels Winery, LLC*, 467 F. Supp. 2d 965, 982 (N.D. Cal. 2006).

On balance, virtually every likelihood of confusion factor weighs in favor of Plaintiffs. Based on this showing and Plaintiffs' demonstration that the NFL Trademarks are entitled to protection, Plaintiffs have proved that they are likely to succeed on the merits of their Lanham Act trademark counterfeiting claims.

**(b) *Plaintiffs are likely to succeed on their California trademark law infringement claims.***

To prevail on their California trademark infringement claims, Plaintiffs must show (1) that their NFL Trademarks are valid and protected by California law; and (2) that Defendants' Counterfeit Merchandise and Counterfeit Tickets reproduce, counterfeit, copy, or imitate the NFL Trademarks in a manner that is likely to cause confusion, mistake, or to deceive. Cal. Bus. & Prof. Code § 14245; *see HIT Entm't, Inc. v. Nat'l Disc. Costume Co., Inc.*, 552 F. Supp. 2d 1099, 1104 (S.D. Cal. 2008) (citing earlier version of the statute); *Choice Hotels Int'l, Inc. v. Kusum Vali, Inc.*, No. 11CV1277 BTM WMC, 2012 WL 2838183, at *3 (S.D. Cal. July 9, 2012).

Here, Plaintiffs' marks are protected by California law because Plaintiffs have registered many of the NFL Trademarks with the California Secretary of State's Trademark Unit. These registrations are valid, as indicated by the Certificates of Registration attached to the Danias Declaration. *See* Danias Decl. ¶ 13 and copies of the Certificates of Registration attached as Exhibit 2 thereto. Courts analyze California trademark infringement claims (both common law and statutory) under the same framework as Lanham Act trademark infringement claims. "[F]ederal and state laws regarding trademarks and related claims of unfair competition are substantially congruent." *Int'l Order of Job's Daughters v. Lindeburg & Co.*, 633 F.2d 912, 916 (9th Cir. 1980); *see Jada Toys, Inc.*, 518 F.3d at 632 (holding that "[a]ll of Mattel's infringement claims [(including, *inter alia,* false designation of origin and common law unfair competition)] are subject to the same test"); *Ingrid & Isabel, LLC v. Baby Be Mine, LLC,* 70 F. Supp. 3d 1105, 1119 (N.D. Cal. 2014) ("The

Ninth Circuit 'has consistently held that state common law claims of unfair competition ... are 'substantially congruent' to claims made under the Lanham Act," (citing *Cleary v. News Corp.*, 30 F.3d 1255, 1262–63 (9th Cir. 1994))). This is because "the courts have uniformly held that common law and statutory trademark infringement are merely specific aspects of unfair competition." *See New West Corp. v. NYM Co. of California, Inc.*, 595 F.2d 1194, 1201 (9th Cir. 1979).

"Under the Lanham Act, the ultimate test is whether the public is likely to be deceived or confused by the similarity of the marks." *Hokto Kinoko Co. v. Concord Farms, Inc.*, 810 F. Supp. 2d 1013, 1031-32 (C.D. Cal. 2011) (*citing Smith v. Chanel, Inc.*, 402 F.2d 562, 563 (9th Cir. 1968)), *aff'd*, 738 F.3d 1085 (9th Cir. 2013). The same is true under California law. *See Acad. of Motion Picture Arts & Scis. v. Benson,* 15 Cal. 2d 685, 692, 104 P.2d 650 (1940) (common law unfair competition protects "a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer" because such "is obnoxious to the law"); *see also Solid 21, Inc. v. Hublot of Am.*, No. CV 11–00468 DMG (JCx), 2015 WL 3756490, at *7 (C.D. Cal. June 12, 2015) (addressing Lanham Act and state trademark and unfair competition claims together). With respect to likelihood of confusion concerning the Counterfeit Merchandise and Counterfeit Tickets, as noted, Plaintiffs have shown that each of the *Sleekcraft* factors weighs in Plaintiffs' favor. Further, as noted, given that the infringing marks are counterfeits, they are inherently confusing. *See Phillip Morris USA Inc.*, 352 F. Supp. 2d at 1073.

As described above, given Defendants' blatant counterfeiting of the NFL Trademarks, Plaintiffs are likely to succeed on the merits of their Lanham Act claim for trademark infringement. Therefore, Plaintiffs are likely to succeed on the merits of their claims for trademark infringement under California Business and Professions Code section 14245 as well.

### 2. Plaintiffs Will Suffer Immediate, Irreparable Harm Absent the Requested *Ex Parte* Injunctive Relief.

Plaintiffs will suffer irreparable harm if the Court does not enjoin Defendants' conduct. In trademark cases, intangible injuries such as the loss of control of a business' reputation, a loss of trade, and damage to goodwill qualify as irreparable harm. *See Rent-A-Center, Inc. v. Canyon Television and Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991); *Stuhlbarg*, 240 F.3d at 841. As the *CytoSport* court aptly noted, "[I]f another person infringes [a mark], that person borrows the owner's reputation, whose quality no longer lies within the owner's control." 617 F. Supp. 2d at 1080. The damage to the owner's reputation that results from such infringement "constitutes irreparable injury for the purpose of granting a preliminary injunction in a trademark case." *Id.* (quoting *Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 195 (3rd Cir. 1990)).

Plaintiffs have demonstrated—through the facts presented in the declarations and Complaint filed herewith—that they will suffer irreparable injury absent the requested relief. The goodwill of the NFL, NFLP, and the Member Clubs is embodied in the NFL Trademarks because the public perceives that the Counterfeit Merchandise and Counterfeit Tickets bearing the NFL Trademarks are sponsored or authorized by the NFL, NFLP, and/or the Member Clubs. Danias Decl. ¶¶ 11-12, 16-18, 21-22. That goodwill is extremely important to the NFL's ability to compete in the highly competitive market for sports and entertainment products and services. *Id.* The Super Bowl championship game is the NFL's showcase event and the sale of inferior quality Counterfeit Merchandise and unredeemable Counterfeit Tickets will, particularly at this time, cause immediate and irreparable damage to Plaintiffs' goodwill and reputation. *See, e.g., Sennheiser Elec. Corp. v. Eichler*, No. CV 12–10809 MMM, 2013 WL 3811775, at *10 (C.D. Cal. July 19, 2013) (finding that "the injury caused by the presence of infringing products in the market—such as lost profits and customers, as well as damage to goodwill and business reputation—will often constitute irreparable injury" for purposes of an injunction).

Because of the unique nature of Defendants' activities, Plaintiffs have no adequate remedy at law. Money damages cannot be determined because of the mobile and transient nature of Defendants' conduct, the inability to document accurately the extent of Defendants' cash sales, and the inability to locate many of the Defendants after their commission of illegal acts. Danias Decl. ¶¶ 29-34; Grooms Decl. ¶ 13. *See Microsoft Corp. v. Buy More, Inc.*, --- F. Supp. 3d ---, No. 14-cv-9697 R, 2015 WL 5680308, at *8 (C.D. Cal. Sept. 24, 2015) (Injury flowing from counterfeit sales "constitutes irreparable harm that cannot be compensated by monetary damages."); *Gilliam v. Am. Broad. Cos., Inc.*, 538 F.2d 14, 19 (2d Cir. 1976) (because the irreparable injury that a plaintiff suffers when a defendant abuses his reputation or goodwill is difficult to measure in monetary terms, plaintiff is clearly entitled to injunctive relief to prevent any further violations). Moreover, Defendants will not obey a restraining order issued on notice, but instead will use that notice as an opportunity to move or destroy all records of their identities, hide all evidence of their dealings in Counterfeit Merchandise and Counterfeit Tickets, and continue their illicit business in alternate locations and/or using alternate distributors. Danias Decl. ¶¶ 33-34; Grooms Decl. ¶ 13. Only via entry of the requested *ex parte* order will Plaintiffs be able to prevent the sale of Counterfeit Merchandise and Counterfeit Tickets and gain tangible evidence of Defendants' identities and profits. *Id.* Thus, the only way to prevent irreparable harm is through the issuance of the requested order.

### 3. There Is a Fair Ground for Litigation and the Balance of Hardships Tips Decidedly in Plaintiffs' Favor.

Plaintiffs have demonstrated that the balance of hardships tips decidedly in Plaintiffs' favor and, at a minimum, raised serious questions going to the merits of their claims.

Regarding the balance of hardships, the Court must weigh the resulting harm to Plaintiffs from the denial of the requested order against any harm Defendants may suffer from granting an injunction that would not be cured by prevailing on the merits and recovering on the bond that Plaintiffs are required to post in conjunction with their request for injunctive relief.

As set forth above, the harm Plaintiffs would suffer in the absence of the requested injunctive relief is irreparable. The continued unauthorized use by Defendants of the NFL Trademarks on Counterfeit Merchandise and Counterfeit Tickets further threatens Plaintiffs' reputations, their ability to control the quality and appearance of products bearing the NFL Trademarks, the goodwill Plaintiffs have amassed in the NFL Trademarks, and the value of the NFL Trademarks as a designation of source. Danias Decl. ¶¶ 31-35. Further, the issuance of the preliminary relief requested by Plaintiffs will not cause any injury to third parties, because the genuine products at issue are readily available from authorized sources. Danias Decl. ¶ 24.

By contrast, there are no equities on the side of the vendors of Counterfeit Merchandise and Counterfeit Tickets. Danias Decl. ¶ 33. Defendants cannot be cognizably harmed if they are ordered to cease infringing Plaintiffs' trademarks, because Defendants would be enjoined only from engaging in unlawful activities. The vast majority are professional "knock-off" artists. Their one and only motive is to turn a quick profit. *Id.* They do not care whether their Counterfeit Merchandise is made poorly or reflects adversely on the NFL, NFLP, the Carolina Panthers, and/or the Denver Broncos, so long as an immediate cash sale can be made. *Id.* They know, but do not care, that their Counterfeit Tickets sold to fans will not be honored by the NFL and will not allow the fans to gain entry into the Super Bowl game. *Id.* The potential harm to Defendants is purely monetary, and entirely illegitimate; Defendants have no valid interest in selling Counterfeit Merchandise or Counterfeit Tickets, or otherwise using the NFL Trademarks without the NFL's permission. Rather, they seek only to take a free ride on the year-round efforts of the NFL, Member Clubs, NFLP, and NFLP's licensees by selling inferior Counterfeit Merchandise and unredeemable Counterfeit Tickets when consumer demand is at a peak. Hence, it is simply inequitable to allow these infringers to reap what they have not sown.

Finally, given "the probable outcome of this action, this is a loss which [Defendants] may justifiably be called upon to bear." *Corning Glass Works v. Jeannette Glass Co.*, 308 F. Supp. 1321, 1328 (S.D.N.Y. 1970), *aff'd*, 432 F.2d 784 (2d Cir. 1970); *see also Polo Fashions, Inc. v. Dick Bruhn, Inc.*, 793 F.2d 1132, 1135-36 (9th Cir. 1986). Accordingly, the balance of equities tips decidedly in Plaintiffs' favor.

**4. The Requested Relief Is in the Public Interest.**

The public interest overwhelmingly favors issuance of the requested relief. "In the trademark context, courts often define the public interest at stake as the right of the public not to be deceived or confused." *CytoSport*, 617 F. Supp. 2d at 1081. As described above, without the requested relief, consumers who purchase Counterfeit Merchandise from Defendants will not receive authorized merchandise, and therefore are very likely to receive inferior products. Danias Decl. ¶¶ 25, 27, 29, 33. Similarly, consumers who purchase Counterfeit Tickets from Defendants will not be able to redeem their tickets for admission into the Super Bowl and, thus, will discover that they have spent considerable money on worthless tickets. *Id.* ¶¶ 26, 29.

Second, NFLP and its licensees have invested substantial time, effort, and money in fulfilling their obligations under their license agreements, which include the production of high-quality merchandise specifically for the golden anniversary Super Bowl 50 game. *Id.* ¶¶ 15-16, 23-24, 32. These licensees, which include businesses within the Bay Area Counties, pay substantial royalties to NFLP and are subject to strict quality control standards in exchange for the right to use the NFL Trademarks. *Id.* In addition to the approximately 200 companies licensed to use the NFL Trademarks, to satisfy demand for merchandise relating specifically to the championship game, NFLP has issued licenses to approximately 100 companies to produce a wide array of products for Super Bowl 50. *Id.* ¶¶ 18 and 23. In turn, legitimate licensees invest substantial amounts of money in selling licensed NFL merchandise and suffer serious loss if Counterfeit Merchandise is sold with impunity. *Id.* These local taxpayers deserve the protection of the Court from the sale of Counterfeit Merchandise by itinerant vendors, many of whom do not reside in this District.

Finally, law enforcement believes that Plaintiffs' Application is consistent with its duties to protect the public safety and will not pose any unnecessary administrative burdens in enforcement. *See* Schoenberger Decl. ¶¶ 7-10; Martinez Decl. ¶¶ 7-9; and Bailey Decl. ¶¶ 7-10. Accordingly, the requested relief is necessary to protect the residents and businesses of northern California, and furthers the public interest.

In sum, Plaintiffs have demonstrated: (1) a likelihood of success on the merits or, at a minimum, that there are sufficiently serious questions going to the merits to make them a fair ground for litigation; (2) that without immediate judicial action Plaintiffs will suffer ongoing irreparable harm; (3) that the balance of hardships tips decidedly toward Plaintiffs; and (4) that the requested relief is in the public interest. Therefore, Plaintiffs are entitled to temporary and preliminary injunctive relief.

### B. PLAINTIFFS ARE ENTITLED TO AN *EX PARTE* SEIZURE ORDER.

Plaintiffs respectfully request an *ex parte* seizure order that authorizes their duly authorized representatives, with the assistance of law enforcement authorities, to seize unlicensed Counterfeit Merchandise and unlicensed, unredeemable Counterfeit Tickets bearing the NFL Trademarks being sold in the Bay Area Counties before, during, and/or after the Super Bowl game. As noted, the requested order is virtually identical to seizure orders issued by courts across the United States in connection with thirty-three past Super Bowl games. Danias Decl. ¶¶ 30-31, 35. This relief is specifically authorized by statute, and is the only form of relief that will help prevent the sale of counterfeit merchandise and tickets and therefore curtail ongoing irreparable harm to Plaintiffs.

### 1. Plaintiffs Satisfy the Requirements for an *Ex Parte* Seizure Order Under 15 U.S.C. § 1116(d).

Faced with "an 'epidemic' of commercial counterfeiting," Congress enacted the Counterfeiting Act of 1984 to provide a meaningful remedy to victims of counterfeit trafficking. *See* S. Rep. No. 98-526, 98th Cong., 2d Sess. 5 (1984), reprinted in 1984 U.S.C.C.A.N. 3627, 3631. The Counterfeiting Act expressly permits a court to grant an *ex parte* seizure order in "[c]ivil actions arising out of [the] use of counterfeit marks," including "goods … and records documenting the manufacture, sale, or receipt" of the counterfeit goods. 15 U.S.C. § 1116(d). The intent and purpose of the *ex parte* seizure provisions are as follows:

> The purpose of the *ex parte* seizure provision is to provide victims of trademark counterfeiting with a means of ensuring that the courts are able to exercise their jurisdiction effectively in counterfeiting cases. Testimony before both the House and Senate Judiciary Committees established that many of those who deal in counterfeits make it a practice to destroy or transfer counterfeit merchandise when a day in court is on the horizon. The *ex parte* seizure procedure is intended to thwart this bad faith tactic, while ensuring ample procedural protection for persons against who such orders are issued.

Senate-House Joint Explanatory Statement on Trademark Counterfeiting Legislation, 130 Cong. Rec. H12076, at 12080 (daily ed. Oct. 10, 1984).

In cases involving the violation of 15 U.S.C. § 1114 by virtue of a defendant's use of a counterfeit mark (which as described above plainly is the case here), the Lanham Act expressly authorizes the court, "upon *ex parte* application, [to] grant an order … for the seizure of goods and counterfeit marks involved in such violation and the means of making such marks, and records documenting the manufacture, sale, or receipt of things involved in such violation." 15 U.S.C. § 1116(d)(1)(A).

The issuance of an *ex parte* order is appropriate upon a showing that (1) the trademark owner seeking the order will provide adequate security; (2) an order other than an *ex parte* order is not adequate to achieve the purposes of 15 U.S.C. § 1114; (3) the applicant has not publicized the requested seizure; (4) the applicant is likely to succeed in showing that the defendants used a counterfeit mark in connection with the sale, offering for sale, or distribution of goods; (5) an immediate and irreparable injury will occur if the requested seizure is not ordered; (6) the matter to be seized will be located at the place identified in the application; (7) the harm to the applicant of denying the application outweighs the harm to the legitimate interests of the persons against whom seizure would be ordered; and (8) if the applicant were to proceed on notice to the defendants, the defendants, or persons acting in concert with the defendants, would destroy, move, hide, or otherwise make such matter inaccessible to the court. 15 U.S.C. § 1116(d)(4).

The above criteria are satisfied here. First, Plaintiffs have indicated their willingness and ability to provide a $30,000 bond to the Court in conjunction with the *ex parte* equitable relief they seek. Danias Decl. ¶ 37. Second, an order other than the *ex parte* order requested by Plaintiffs would be inadequate to achieve the purposes of the Lanham Act because if Defendants are served with a temporary restraining order but their Counterfeit Merchandise and Counterfeit Tickets are not seized, Defendants' street distributors will move the knock-offs elsewhere, dispose of them for cash, and disappear. Danias Decl. ¶ 29, 33. Defendants also would cover up their activities by destroying evidence of their counterfeiting. Grooms Decl. ¶ 13. Third, Plaintiffs have not publicized that they are seeking the relief requested in the requested order. Petersen Decl. ¶ 4. Further, as set forth in Plaintiffs' accompanying papers and proposed order, all papers in support of Plaintiffs' Application are requested to be kept under seal by the Clerk of this Court pending the effectuation of the requested seizure order. Fourth, Plaintiffs have submitted evidence demonstrating that they are likely to succeed in showing that Defendants have used the NFL Trademarks, without authorization, to offer and sell Counterfeit Merchandise and Counterfeit Tickets. Danias Decl. ¶¶ 25-35. Fifth, Plaintiffs have shown that they are likely to suffer immediate and irreparable injury if the requested *ex parte* order is not granted because Defendants are likely to move or destroy all records of their identities, hide all evidence of their dealings in Counterfeit Merchandise and Counterfeit Tickets, and continue their illicit business at alternate locations and/or using alternate distributors. *Id.* at ¶¶ 29-34; Grooms Dec. ¶¶ 12-13. If this occurs, Plaintiffs will suffer irreparable injury as consumers will be deceived by Defendants' counterfeit marks, and Plaintiffs will be denied access to evidence needed to determine the identities of Defendants and needed to obtain an accounting of profits to which Plaintiffs are entitled. *See Tommy Hilfiger Licensing, Inc. v. Tee's Ave., Inc.*, 924 F. Supp. 17, 24 (S.D.N.Y. 1996) (noting that the required showing of irreparable harm for a seizure order is the same as the showing of irreparable harm for granting a temporary restraining order or preliminary injunction). Sixth, Plaintiffs have demonstrated that Defendants' Counterfeit Merchandise and Counterfeit Tickets will be located at the places identified in the Application, namely in locations frequented by itinerant vendors in the Bay Area Counties. *See e.g.*, Holdridge Decl. ¶¶ 7-9. Seventh, as discussed above with respect to the balance of the equities, the harm to Plaintiffs of denying the Application vastly outweighs the harm to the legitimate interests of Defendants, since Defendants have no legitimate interest in using the NFL Trademarks in the offer and sale of Counterfeit Merchandise and Counterfeit Tickets. Danias Decl. ¶ 33. Eighth, Plaintiffs have demonstrated that if notified of a temporary restraining order, Defendants are likely to retain the Counterfeit Merchandise and Counterfeit Tickets by destroying, hiding, or transferring them to their cohorts. Danias Decl. ¶ 33; Groom Decl. ¶ 13. Finally, as required by statute, Plaintiffs, via their outside counsel, have notified the United States Attorney for the Northern District of California of their intention to file this action and seek an *ex parte* order. Petersen Decl. ¶ 5. Thus, the requested *ex parte* seizure order is authorized by 15 U.S.C. § 1116(d).

**2. California Business and Professions Code Section 14250 Also Authorizes the Requested Seizure Order.**

In the case of a suit brought by the owner of a mark registered with the State of California, state law authorizes the Court to (1) "enjoin the manufacture, use, display or sale of any counterfeits or imitations thereof …"; (2) "grant injunctions to restrain the manufacture, use, display, or sale …"; and (3) "order seizure of any goods, labels, packaging or any components bearing the counterfeit mark and all instrumentalities used in the production of the counterfeit goods … upon a showing of good cause and a probability of success on the merits and upon the posting of [an undertaking consistent with the amount of probable damages recoverable if the goods were deemed non-counterfeit]." Cal. Bus. & Prof. Code § 14250.

Here, Plaintiffs are seeking an immediate injunction to restrain the manufacture, use, display, and sale of Counterfeit Merchandise and Counterfeit Tickets that bear Plaintiffs' NFL Trademarks that are registered in California. In light of the strong evidence that Defendants would not obey a restraining order, the only "just and reasonable" way to enjoin Defendants' unlawful activity is via an *ex parte* order empowering Plaintiffs' representatives (accompanied by duly authorized law enforcement agents) to seize Defendants' Counterfeit Merchandise and Counterfeit Tickets, and to securely store those goods in Plaintiffs' custody until further order of this Court following the show cause hearing. Accordingly, California law provides an additional basis for entry of the requested *ex parte* seizure.

**3. Plaintiffs Cannot and Should Not Be Required to Proceed on Notice to Defendants.**

Both federal and state trademark laws permit seizures without notice to defendant on a showing of good cause. *See In the Matter of Vuitton et Fils S.A.*, 606 F.2d 1, 5 (2d Cir. 1979) (authorizing *ex parte* seizure because it was likely that the defendant would dispose of infringing goods prior to the hearing, explaining that "notice all too often appears to serve only to render fruitless further prosecution of the action"); *Otter Prods., LLC v. Anke Grp. Indus. Ltd.*, No. 2:13-cv-00029-MMD, 2013 WL 5910882, at *3 (D. Nev. Jan. 8, 2013) (authorizing *ex parte* seizure pursuant to Lanham Act claims because counterfeiter maintained no known regular place of business and posed risk of destruction of evidence absent seizure order); *see also* Cal. Bus. & Prof. Code § 14250 ("If it appears from the *ex parte* application that there is good reason for proceeding without notification to the defendant, the court may, for good cause shown, waive the requirement of notice for the *ex parte* proceeding.") (italics added).

Here, it is vital that the requested relief be entered on an *ex parte* basis. First, the identities and locations of the unnamed Defendants in this action cannot be ascertained until they commence their illegal counterfeiting activities. Thus, prior notice of the request for a temporary restraining order to any of the Defendants simply is not feasible.

Second, even if Defendants' identities and locations were known to Plaintiffs at this time (they are not), courts around the country have recognized that *ex parte* seizure orders without notice are the only effective means to stop the illegal actions of professional distributors and itinerant vendors of counterfeit merchandise. *See, e.g.*, *In the Matter of Vuitton et Fils S.A.*, 606 F.2d at 5;

*Vuitton v. White ("Vuitton")*, 945 F.2d 569, 575 (3rd Cir. 1991) ("*ex parte* seizures [are] a necessary tool to thwart the bad faith efforts of fly-by-night defendants to evade the jurisdiction of the court") (citation omitted); *HIT Entm't, Inc. v. Nat'l Disc. Costume Co., Inc.*, 552 F. Supp. 2d 1099, 1103 (S.D. Cal. 2008) (relying on evidence collected through order authorizing U.S. Marshals to seize infringing goods); *SKS Merch., LLC v. Barry*, 233 F. Supp. 2d 841, 844 (E.D. Ky. 2002); *Fimab-Finanziaria Maglificio v. Helio Import/Export, Inc.*, 601 F. Supp. 1, 2 (S.D. Fla. 1983) ("[t]he weight of authority around the country appears to favor the granting of such *ex parte* relief in trademark counterfeiting cases, where fake versions of well-known brands are deliberately passed off to the public as the genuine article"). This is because "[e]xperience in hundreds of cases has shown that it is extremely likely that a counterfeiter, upon being apprised of the institution of a lawsuit by the trademark owner, will conceal his infringing merchandise and either destroy or conceal all records relating to this merchandise, thereby frustrating implementation of the trademark owner's statutory and common law rights." *Vuitton*, 945 F.2d at 571 (citation omitted). As these courts understood, it is counterproductive to hold a hearing before issuance of an injunction against a counterfeiter since the hearing will serve only to warn the counterfeiters that they should move, hide, destroy, or conceal their goods and records. *See, e.g., Otter Prods., LLC*, 2013 WL 5910882, at *3.

For these reasons, every year for the past thirty-three years, courts across the country have recognized that the entry of a temporary restraining order and order of seizure without notice is absolutely necessary for the protection of the famous NFL Trademarks in connection with the Super Bowl game. *See, e.g., NFL Properties LLC, et al. v. Does 1 through 100, inclusive*, No. 2:14-CV-00470-SRC-CLW (D.N.J. Jan. 27, 2014) ("[E]ntry of an *Ex Parte* Temporary Restraining Order and Seizure Order will serve to adequately achieve the objectives underlying the federal trademark law of the United States of America and the statutory and common law trademark and unfair competition laws of the State of New Jersey.") (italics added); *National Football League Properties, Inc. v. Yingling*, 224 U.S.P.Q. 848, 851 (Fla. Cir. Ct. 1984) ("an *ex parte* seizure order is the only relief that will effectively stop itinerant vendors of knock-off merchandise who direct their activities to large scale public events such as sporting events"); *NFL Properties LLC, et al. v. Does 1 through*

*100, inclusive,* No. CV2015-000436 (Ariz. Sup. Ct., Maricopa County 2015) ("This Court is … of the opinion that … Plaintiffs have clearly and specifically demonstrated that [the TRO and seizure order] may be granted without notice because vendors and manufacturers of counterfeit merchandise and tickets … have no business identity … and/or cannot be identified …."); and other civil actions cited below.

As detailed in the annexed declarations, there is no reason to think that this year, at the Super Bowl 50 game, Defendants will obey the Court's order if issued on notice. In fact, there is every reason to expect that Defendants will go to great lengths to escape the applicability of the order to them. Plaintiffs' Application demonstrates that the counterfeiters at the Super Bowl game are well aware of the illegality of their conduct, and often act in concert or through anonymous distributors so that it is extremely difficult, if not impossible, to identify the source of any given counterfeit merchandise that is sold in a retail store, at a street stand, or out of portable containers. *See* Holdridge Decl. ¶¶ 10-11; Grooms Decl. ¶¶ 11-13. Defendants lack a definite or permanent business identity and cannot be located or served with process in conventional fashion. *Id.* Once word spreads that legal action may be taken against infringers, merchandise will be concealed or transferred, rendering it extremely unlikely that Plaintiffs will be able to obtain evidence to secure any meaningful relief or that the merchandise will ever be kept out of channels of distribution. *Id.* Accordingly, the requested seizure order must be granted without notice to Defendants.

### C. *EX PARTE* TEMPORARY RESTRAINING ORDERS AND SEIZURE ORDERS HAVE BEEN APPROVED BY COURTS IN CONNECTION WITH THE PAST THIRTY-THREE SUPER BOWL GAMES.

The valuable property rights of the NFL and its Member Clubs have been protected by courts at each Super Bowl game since 1983 by the issuance of an *ex parte* temporary restraining order and an order of seizure against John Doe vendors of counterfeit merchandise. *See* Danias Decl. ¶ 30 and Exhibit 4 (attaching orders granted by Courts in the past); *see also NFL Properties LLC, et al. v. Does 1 through 100, inclusive,* No. CV2015-000436 (Ariz. Sup. Ct., Maricopa Co. 2015); *NFL Properties LLC, et al. v. Does 1 through 100, inclusive,* 2:14-CV-00470-SRC-CLW (D.N.J. Jan. 27, 2014) and *NFL Properties LLC, et al. v. Does 1 through 100, inclusive*, No. 14-cv-0404 (S.D.N.Y. 2014) (New Jersey and New York co-hosted Super Bowl events); *NFL Properties*

*LLC, et al. v. Does 1 through 100, inclusive*, No. 13-779 (La. Dist. Ct. Orleans Co., 2013); *NFL Properties LLC, et al. v. Does 1 through 100, inclusive*, No. 49D041201PL0003026 (Ind. Dist. Ct., Marion Co. 2012); *NFL Properties, Inc.* v. *Does 1 through 100*, No. 352-250686-11 (Tx. Dist. Ct., Tarrant Co. 2011); *NFL Properties LLC v. Does 1-100*, No. 10-05111 CA 11 (Fla. Cir. Ct., Miami-Dade Co. 2010); *NFL Properties LLC v. Does 1-125*, No. 09-CI-1280 (Fla. Cir. Ct., Hillsborough Co. 2009); *NFL Properties LLC v. Reamer, et al.*, No. 2008-001818 (Ariz. Super. Ct., Maricopa Co. 2008); *NFL Properties LLC v. Does 1-150,* No. 07-02181 (Fla. Cir. Ct., Miami-Dade Co. 2007); *NFL Properties LLC v. Does 1-400*, No. 06-602248 (Mich. Cir. Ct., Wayne Co. 2006); *NFL Properties LLC v. Does 1-400*, No. 05-CA-000802 (Fla. Cir. Ct., Duval Co. 2005); *NFL Properties LLC v. Does 1-400*, No. 04-03381 (189 Dist. Tex., Harris Co. 2004); *NFL Props. LLC, et al. v. McClintock, et al.*, No. GIC803947 (Cal. Super. Ct., San Diego Co. 2003); *NFL Props. LLC v. Watts*, No. CV 2002-1584 (La. Civ. Dist. Ct., Parish of Orleans 2002); *National Football League Props., Inc. v. Does 1 Through 400*, Civ. Action No. 2001-637 (Fla. Cir. Ct., Hillsborough Co. 2001); *National Football League Props., Inc.* v. *Does 1 Through 400*, Civ. Action No. 2000-cv-18643 (Ga. Sup. Ct., Fulton Co. Jan. 26, 2000); *National Football League Props., Inc. v. Howard*, No. 99-02035 (Fla. Cir. Ct., Dade Co. 1999); *National Football League Props., Inc. v. Barreto*, 46 U.S.P.Q.2d 1361 (Cal. Super. Ct., San Diego Co. 1998); *National Football League Props., Inc. v. Williams*, No. CV 97-1199 (La. Civ. Dist. Ct., Parish of Orleans 1997); *National Football League Props., Inc. v. Szymoniak*, No. CV 96-01381 (Ariz. Super. Ct., Maricopa Co. 1996); *National Football League Props., Inc. v. Shakir*, No. 95-01518 (Fla. Cir. Ct., Dade Co. 1995); *National Football League Props., Inc. v. Does 1 Through 400*, No. E-23774 (Sup. Ct., Fulton Co., Ga. 1994); *National Football League Props., Inc. v. Doe*, 28 U.S.P.Q.2d 1866 (Cal. Super. Ct., Los Angeles Co. 1993); *National Football League Props., Inc. v. Allen*, 22 U.S.P.Q.2d 1634 (4th Dist. Minn. 1992); *National Football League Props., Inc. v. Lieber*, 19 U.S.P.Q.2d 1783 (Fla. Cir. Ct., Hillsborough Co. 1991); *National Football League Props., Inc. v. De Vito*, No. 90-1647 (La. Civ. Dist. Ct., Parish of Orleans 1990); *National Football League Props., Inc. v. Jamal*, 10 U.S.P.Q.2d 1772 (Fla. Cir. Ct., Dade Co. 1989); *National Football League Props., Inc. v. Tiersten*, 7 U.S.P.Q.2d 1494 (Cal. Super. Ct., San Diego Co. 1988); *National Football League Props., Inc. v.*

*De Vito*, 2 U.S.P.Q.2d 1775 (Cal. Super. Ct., Los Angeles Co. 1987); *National Football League Props., Inc. v. Davis*, No. 86-1343 (La. Civ. Dist. Ct., Parish of Orleans 1986); *National Football League Props., Inc. v. De Vito*, No. P45877 (Cal. Super. Ct., Santa Clara Co. 1985); *National Football League Props., Inc. v. Yingling*, 224 U.S.P.Q. 848 (Fla. Cir. Ct., Hillsborough Co. 1984); *National Football League Props., Inc. v. Eugene Robinson*, No. C440022 (Cal. Super. Ct., Los Angeles Co. 1983).

As these court orders amply demonstrate, Defendants' sale of counterfeit Super Bowl-related merchandise and tickets in and around the San Francisco Bay Area is likely to confuse the purchasing public and deceive them into believing that these merchandise and tickets are sponsored or authorized by the NFL, NFLP, the Carolina Panthers, and/or the Denver Broncos, and the requested *ex parte* relief is just, reasonable, and necessary.

## IV. CONCLUSION

For the above and foregoing reasons, Plaintiffs respectfully request that the Court issue a Temporary Restraining Order, Seizure Order, and Order to Show Cause for Preliminary Injunction in the form sought herein.

Dated: January 27, 2016

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